The rulings of trial court on these controlling questions render a new trial along other lines inevitable, and make it unnecessary to notice the remaining assignments of error.

For these reasons, the judgment must be reversed, the verdict of the jury set aside, and the case remanded for a new trial, not in conflict with the views expressed in this opinion.

Note.

This case decides two very important propositions, and though the first point has been touched on in several early cases in this state, nothing seems to have been decided as to the second. The first proposition is that the definition that rent is a profit issuing yearly out of lands and tenements corporeal is too narrow, in that it overlooks such common cases as where a furnished house or stocked farm is rented. It was held that where a lease was of a mill-site and of sufficient water from a canal to operate the mill and machinery, the stipulated compensation for the use of the water constituted rent. There can be no question as to the correctness of this ruling; it settles the definition of rent in this state to be: A return or compensation issuing periodically out of lands and tenements corporeal, or out of lands and its furniture, in return for their use. The second proposition decided by the court is that under the Virginia Code an abandonment of one sufficient levy under a distress warrant is not a bar to a second levy. The court points out that the reason for the contrary rule which prevailed at common law was that "at the common law the landlord was his own executioner, 'his own carver.' The proceeding was the sole act of the landlord, and the tenant, who was at his mercy, was not liable to be twice vexed for the same rent." The court said "the proceeding under the statute is judicial in its character, and the rights of the tenant are thoroughly safeguarded."

WATTS *et al v.* NEWBERRY *et al.*

June 20, 1907.

[57 S. E. 657.]

1. Executors—Claims—Priority—Guardian De Son Tort.—A ward of a guardian de son tort was not entitled to priority of payment of his claim against such guardian out of the guardian's estate, under Code 1904, § 2660, providing that the assets of the decedent in the hands of his personal representative, if insufficient to satisfy all demands, should be applied, inter alia, to the payment of debts due as trustee for persons under disabilities or as guardian or committee, where the qualification was in Virginia.

2. Trusts—Tracing Trust Funds—Claims against Guardian.—Where a guardian de son tort received funds belonging to his ward, which he wrongfully mingled with his own property, so that it could not be clearly identified or distinctly traced into any property, chose in

action, or fund which became a part of the guardian's estate, after his death and which could be made the subject out of which the trust fund could be replaced, the ward was not entitled to priority of payment out of the guardian's estate over his general creditors.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 525.]

3. Attorney and Client—Attorney's Lien—Subjects.—Where certain drafts were placed in the hands of the owner's attorneys in order to enable the owner at any time to realize the money on them and apply it to the payment of his debts as he thought best, and to prevent the fund from being levied on, the drafts were not subject to a lien for claims for professional services held by the attorneys against the owner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, §§ 378, 403.]

4. Court Commissioners—Sale of Property—Duties.—Where a court commissioner is appointed to make sales of property and pay out the proceeds under decrees of the court, he is the mere agent of the court, and while entitled to ask the court to construe its decrees and make clear his duties, he has no right to take sides in controversies over the fund in his hands or aid any claimant in asserting his right thereto.

5. Mortgages—Deed of Trust—Extent of Lien.—Where certain land, when included in a deed of trust, was subject to a lien for purchase money, and was thereafter sold to satisfy that lien, so that it was wholly lost as a security for the debt secured by the deed, the lien of the deed of trust could not for that reason be extended to another distinct interest in the land subsequently acquired by the grantor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 256.]

Appeal from Circuit Court, Tazewell County.

Judicial accounting by F. G. S. Watts, executrix of J. G. Watts, deceased. From an order settling the account, H. Newberry and others appeal. Affirmed in part, and reversed in part.

Prior to April, 1891, Sue G. Hancock, suing in her own right and as administratrix of Sue H. Hancock, deceased, filed a bill against J. G. Watts in his lifetime to enforce two judgments against Watts, amounting to $2,307.74, besides interest and costs, and a decree in her favor as administratrix was entered March 30, 1900. The bill alleged a list of real estate owned at that time by Watts, and showed that on March 28, 1895, he conveyed most, if not all, of it to secure certain debts. At the April, 1901, term of the court a decree was entered referring the case to a commissioner to ascertain and report the real estate owned by Watts and the liens thereon. Before this report was made Watts died,

and prior to December, 1902, the firm of J. S. & A. P. Gillespie and A. P. Gillespie, guardian of the children of James M. McGuire, deceased, suing for themselves and all creditors of the estate of Watts, filed their bill against F. G. S. Watts, his executrix, seeking to enforce collection of certain debts. In this bill it was charged that Watts, a short time before his death, collected a large amount of money from the sale of lands, and that he manipulated and concealed the funds to prevent them from being subjected to the payment of his debts, by depositing them in the Bank of Clinch Valley and procuring drafts on the Park National Bank of New York therefor, which he deposited with his attorneys, and at the time of his death these drafts remained uncollected in the attorney's hands, and were so drawn in order that the attorneys could collect them.

The attorneys, Henry & Graham and Greever & Gillespie, answered, admitting that the drafts were deposited with them as alleged in the bill, and claiming a lien thereon for professional services. The cases were consolidated and heard together, and at the August, 1902, term a decree was entered directing the attorneys to turn over the drafts to the executrix without prejudice to their lien, and J. P. Royall was substituted as commissioner to ascertain and report the real and personal estate owned by Watts at his death and the debts to which the estate was liable, their nature and priority.

Royall thereafter filed his report, showing an indebtedness in favor of R. Bowen Watts, and that such debt was entitled to priority. The report also showed three debts in favor of Greever & Gillespie and referred the question as to their lien to the court. It also showed a considerable indebtedness in favor of H. Newberry, secured by a trust deed.

Chapman & Gillespie, for appellants.
Wm. H. Werth and *S. M. B. Coulling,* for appellees.

BUCHANAN, J. The first assignment of error presents the question whether or not, in the payment of the debts of John G. Watts, deceased, out of he assets in the hands of his personal representative, priority is accorded by law to the debt owing by the said decedent as guardian de son tort of the appellant R. Bowen Watts; the assets being insufficient to discharge all of the debts.

Section 2660 of the Code of 1904 provides that where the assets of a decedent in the hands of the personal representative, after the payment of funeral expenses and charges of administration, are not sufficient for the satisfaction of all demands against him, they shall be applied as follows: First, to the claims of physicians and certain other named classes of persons for services rendered and articles furnished during the decedent's last illness,

not exceeding $50 to any one class of the persons named; second, to debts due the United States and this state; third, to taxes and levies assessed upon the decedent previous to his death; fourth, to debts due as trustee for persons under disabilities, as receiver or commissioner under a decree of court of this state, as personal representative, guardian, or committee, where the qualification was in his state; fifth, to all other demands, except those in the next class; and, sixth, to voluntary obligations.

It will be observed that the priority provided for by the fourth clause of section 2660 against the estates of guardians is limited by its language to guardians who qualify in this state. It is insisted, however, that the purpose of the Legislature in using that language was to make a distinction between a guardian who qualified in this state and one who qualified in a foreign jurisdiction, and to give to the wards of the former class of guardians additional protection, and that it never could have been the intention of the Legislature to leave the wards of a de facto guardian in this state without a like protection.

Conceding that there is no reason why the wards of a guardian de son tort and of a guardian who qualified in this state should not have the same right of priority in the distribution of their guardian's estate, the question with us is, does the statute give them such right?

In the case of Price v. Harrison, 31 Grat. 114, 117, which arose before the amendment to the statute now under consideration giving priority to debts due from trustees to persons under disabilities, it was argued that such persons were within the spirit or equity of the statute and should have the priority accorded by it, although they were not within the letter. In reply to that contention it was said by Judge Burks, in delivering the opinion of the court, that "in the construction of statutes the primary object is to discover the intention of the Legislature, and where that intention can be indubitably ascertained the courts are bound to give it effect, whatever they may think of its wisdom or policy. Where the language is free from ambiguity and the intention plainly manfested by it, there is no room for construction." "'There is always danger,'" he continues, quoting from Lord Tenderden, "'in giving effect to what is called the equity of a statute. It is much safer and better to rely on and abide by the plain words, although the Legislature might have provided for other cases, had their attention been directed to them.'" Brown v. Lambert, 33 Grat. 256, 267, 268; Suth. on Stat. Constr. § 415.

Applying these rules of construction to this case, it is clear, we think, that the statute does not embrace the wards of a guardian de son tort. The only guardian whose estate is subject to such priority is one who has qualified as such and whose qualification was in this state. We are no more at liberty to disregard the

requirement that he has been appointed guardian, for his qualification implies this, than we are to disregard the requirement that his qualification must be in this state.

It is insisted that the appellant R. Bowen Watts was entitled to have priority in the payment of his debt over the general creditors of the decedent's estate, because "the funds or estate represented by the recovery never belonged to the decedent, and upon his death did not constitute a part of his estate, but had by his wrongful act become mingled with his other property."

The record, as we understand it, does not identify any part of the funds in the hands of the personal representative or under the control of the court, arising from the sale of the decedent's lands, as the property of the appellant, which went into the hands of his guardian, nor is it shown that said funds embrace the proceeds of such property or any part thereof. They may do so, but the evidence fails to show it.

There are some cases cited by appellant's counsel which hold that, in order to give a preference to the beneficiary of a trust estate, which has been dissipated by the person holding it in a fiduciary capacity, it is not necessary to trace the trust fund into some specific property, but it is sufficient if it can be traced into the estate of the defaulting fiduciary. The better doctrine, as it seems to us, and that sustained by the weight of authority, is that, in order to recover a trust fund which has been misapplied by the person holding it in a fiduciary capacity, it must be clearly identified or distinctly traced into the property, chose in action, or fund which is to be made the subject out of which the trust fund is to be replaced. See National Bank *v.* Life Ins. Co., 104 U. S. 54, 26 L. Ed. 693, and cases cited; 3 Pom. Eq. Jur. (3d Ed.) §§ 1047, 1048, note "f," and cases cited, and sections 1079, 1080; Holmes *v.* Gilman, 34 N. E. 205, 138 N. Y. 369, 20 L. R. A. 566, 34 Am. St. Rep. 463; Wetherell *v.* O'Brien, 29 N. E. 904, 140 Ill. 146, 33 Am. St. Rep. 221.

The next question to be considered is whether or not the trial court erred in holding that the attorneys of John G. Watts had an attorney's lien on certain drafts payable to the order of said Watts in their hands at the time of his death.

A short time before the death of Mr. Watts, he deposited in a bank in Tazewell county several thousand dollars, the proceeds of the sales of lands or an interest in lands owned by him, lying in the state of West Virginia. After making the deposit he consulted with two firms of attorneys, who had been his counsel for some time, as to the best method of preventing the money deposited in bank from becoming involved in a suit with his wife and her sons by a former marriage, and tied up as his other property then was, in order that the fund in bank might be under his personal control, to be applied by him to the payment of such of his

debts as he thought proper. "We advised him," as stated in their answer, "to put the money in New York drafts, where it would not be subject to garnishment or attachment proceedings, so that he could at any time realize the money on the drafts and apply it to the payment of such debts as he thought best." This advice he acted upon, and secured three drafts, one of which he deposited with one firm of attorneys, and the other two drafts with the other firm. The drafts remained in the possession of his attorneys until Mr. Watts' death, which was unexpected and very soon afterwards. They continued to hold them after his death, and until after this suit was brought, awaiting proper legal direction as to what disposition should be made of them. At the time of Mr. Watts' death he was indebted to both firms for professional services rendered him, a part of which was for advice given him concerning the management of the funds mentioned. Both firms claimed an attorney's lien on the drafts respectively held by them for all the fees due them. The court required the drafts to be delivered to the personal representative of the decedent's estate, but without prejudice to the lien claimed by the attorneys. The debt due one of the firms was settled or adjusted after the filing of their answer, and the claim of the other firm alone is involved in this appeal.

The right of the attorneys to a lien on the drafts in their hands for their fees, or any part thereof, is denied by the appellant, upon the ground, first, that the advice given the decedent was to enable him to conceal his property from his creditors, which was not such advice as they had the right to give, and the drafts were therefore not placed in their hands in the course of professional employment; and, second, that the deposit of the drafts with them was made for a specific purpose, which is inconsistent with the claim of a lien.

In the view we take of this assignment of error, it is unnecessary to consider the question whether or not the drafts came into the hands of the attorneys in the course of their professional employment; for, if it were conceded that the drafts were deposited with the attorneys in the course of professional employment, it is clear we think that they were placed in their hands for a special purpose inconsistent with the claim of a lien.

The object of placing the drafts in the hands of the attorneys, as stated by them in their original and amended answers, was to enable the client at any time to realize the money on the drafts and apply it to the payment of such debts as he thought best. The action of the client in depositing the drafts with his attorneys as they had advised for that express purpose is inconsistent with the claim of lien now asserted by his attorneys. Their debt might not be, and most probably was not, one of the debts which he intended to pay out of the money deposited in bank.

If it had been, he would very likely have given his attorneys a check in payment of their debt and obtained drafts for the residue only. If their debt was not one of the debts which he, in his then financial condition, "thought it best" to pay out of the proceeds of the drafts, he would be compelled to submit to the demand of his attorneys or have the whole purpose for which he deposited the drafts in accordance with their advice thwarted.

That an attorney has no lien upon property placed in his hands for a special purpose, which is inconsistent with or adverse to the claim of a lien, see Anderson *v.* Bosworth, 8 Atl. 339, 15 R. I. 443, 2 Am. St. Rep. 910; Weeks on Attorneys, § 371; 4 Cyc. 1016; Ex parte Pemberton, 18 Vesey, 281; Walker *v.* Birch, 6 Term Rep. 258, 262.

The remaining assignment of error is to the action of the court in sustaining the exception of H. Newberry to the reports of Commissioner Chapman, and holding that the proceeds arising from the sale of the one-tenth interest in the Nye Cove tract of land should be paid to H. Newberry.

One of the exceptions to Commissioner Chapman's report is that it purported to furnish documentary and other evidence to be considered by the court in passing upon the question upon which he asked the court's instructions.

A commissioner of a court, in making sales, collecting the proceeds of such sales, and paying the same out under the orders and decrees of the court, is the mere agent of the court. His duty in paying out the money collected from such sales is to pay it out as directed by the court. If he has doubt about which creditor is entitled to payment, he has the right to ask the court to construe its decrees and make clear what his duty is; but he has no right to take sides in controversies over the fund in his hands or aid any claimant in asserting his right thereto. The exhibits filed with Commissioner Chapman's report to show that H. Newberry did not have a lien on the one-tenth interest in the Nye Cove tract of land purchased by John G. Watts in the case of Straley and Others *v.* Newberry and Others were not, therefore, properly a part of the record, and could not be looked to in passing upon the question whether or not H. Newberry had a lien on the proceeds of the sale of that interest.

The report made in the case, ascertaining the liens and their priorities, and which was confirmed by the court, finds that John G. Watts conveyed certain property in trust to secure the payment of the debt asserted by Newberry. Among the property so conveyed was "one undivided fifth of that certain tract of land containing 2,325 acres, lying in Tazewell county, known as the 'Nye Cove land,' and being the same land purchased by John G. Watts and others from W. A. French and H. W. Straley." The one-tenth undivided interest in the same tract of land, and upon the

proceeds of which Newberry claims to have a lien by virtue of the said deed of trust, was not owned by Watts when the deed of trust was executed. That one-tenth interest was one-half of the undivided interest of William Mahone in the Nye Cove tract of land, and was purchased by Watts subsequently to the execution of the deed of trust at a judicial sale made in the cause of Straley and Others *v.* Newberry and Others.

While the undivided one-fifth interest purchased by Watts from French and Straley and the undivided one-tenth interest purchased by Watts at the sale made by the court are parts of the Nye Cove tract of land, they are wholly distinct interests. Conceding, as was stated in argument, and not denied (though that fact does not clearly appear by the record), that the said undivided fifth interest embraced in the deed of trust was subject to a lien for the purchase money due French and Straley, and that it was sold to satisfy that lien, so that it was wholly lost as a security for Newberry's debt, we know of no rule of law that would extend the lien of the deed of trust to another and wholly distinct interest in the land subsequently asquired by Watts. If the interest subsequently acquired by Watts had been a part of the interest conveyed by the deed of trust, although that instrument contained no warranty of title, it may be that under the decisions of Nye *v.* Lovitt, 92 Va. 710, 717, 24 S. E. 345; Reynolds *v.* Cook, 83 Va. 817, 3 S. E. 710, 5 Am. St. Rep. 317, Burtners *v.* Keran, 24 Grat. 42, and Doswell *v.* Buchanan, 3 Leigh, 365, 23 Am. Dec. 280, it would have inured to the benefit of the deed of trust creditor; but upon this question we express no opinion, as it is not involved in this case.

We are of opinion that the decree complained of should be affirmed, except in so far as it holds that the decedent's attorneys had a lien on the drafts in their hands for the payment of their fees, and in so far as it holds that H. Newberry was entitled to the proceeds of the sale of the decedent's one-tenth interest in the Nye Cove tract of land. As to those claims, the decree must be reversed and set aside.

BEALE, Mayor, *et al. v.* PANKEY.

(June 20, 1907.)

[57 S. E. 661.]

1. **Statutes—Amendment—Title.**—Act March 7, 1906 (Acts 1906, p. 90), entitled "An act to amend and re-enact an act entitled 'An act incorporating the town of Pamplin City, Virginia,' approved March 24, 1874, as amended by an act entitled 'An act to amend and re-enact the third section of an act incorporating Pamplin City,' approved